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ALEXANDER L. STEVAS
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NO. 82-496

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

CLYDE C. COFFEY,

Petitioner,

vs.

STATE OF WASHINGTON, Department of Social and Health Services, State of Washington,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT H. STEVENSON
and
DAVID W. HARRIS

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QUESTIONS PRESENTED

(1) Is a state a "person" under Section 1983 of the Federal Civil Rights Act, and, if so, entitled to continue to immunize itself under the Eleventh Amendment from a civil damage action by a private citizen?

(2) Should the scope of the Federal Civil Rights Act now be broadened to states and their agencies under the "equitable loss spreading" doctrine of Owen v. City of Independence, Missouri, 445 U.S. 622, (1980)?

(3) May a state restrict the rights afforded under Section 1983 of the Federal Civil Rights Act by construing those rights as mere legal theory?

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PETITION FOR A WRIT OF CERTIORARI
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The petitioner respectfully prays that a Writ of Certiorari issue to review the refusal of the Supreme Court of the State of Washington to review the appellant's claim for damages for violation of his Fourteenth Amendment rights against the state under the Federal Civil Rights Act.

(42 U.S.C. §1983).

OPINION BELOW

In December of 1980, the trial court refused to permit appellant to include a claim for damages against the state under the Federal Civil Rights Act. It granted the state's motion to dismiss the claim under the authority of Edgar v. State of Washington, 92 W^{2d} 217, but certified the question to the Washington State Supreme Court for review as one involving a fundamental and urgent issue requiring prompt determination because of this Court's decisions in Owen v. City of Independence, Missouri, 445 U.S. 622 (1980) and Monell v. Dept. of Social and Health Services of the City of New York, 436 U.S. 658 (1978). (Appendix 1). The State Supreme Court referred the appeal back to the Washington State Court of Appeals on July 22, 1981. The commissioner of the Court of Appeals

dismissed the appeal on the ground that it was not a final judgment but alleged only a legal theory. (Appendix 2). That ruling was later upheld by the State Supreme Court by its minute entry of June 30, 1982. (Appendix 3). A mandate of the Court of Appeals dated July 14, 1982 remanded the matter back to the trial court. (Appendix 4). This petition followed.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) and 28 U.S.C. 1331(a).

STATUTE INVOLVED

The Federal Civil Rights Act of 1871, section 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States ....to the deprivation of

any rights.....shall be
liable to the party injured
in an action at law....."

STATEMENT OF THE CASE

The heart of the appellant's case below is a complaint that the state's agency (DSHS) violated his Fourteenth Amendment rights under the Federal Civil Rights Act and caused him damage. The state contends that it is not liable for the acts of its agencies, committed in performance of their governmental functions.

Appellant, the natural father of his 13-year old daughter, commenced an action for damages against the State of Washington and the Department of Social and Health Services of the state, for severe emotional distress suffered because of the department's alleged misconduct.

It was alleged that the state had unlawfully interfered with his parental relationship and violated his Fourteenth Amend-

ment rights by denying him a hearing upon a child abuse report concerning the spanking of his daughter and seizing her without a hearing. The filing of a child abuse report in a central stage registry is required under a state statute (R.C.W. 26.44.070) when any "report" is made.

Appellant's daughter (Cindy) had been attending a religious school in February of 1979. She had been getting poor grades because of reading difficulties (later diagnosed as dyslexia), but had had no disciplinary problems either at home or at school.

When Cindy and her stepmother had a family argument over the failure of Cindy to do certain household chores, the stepmother spanked her with a wooden spoon. Angered, Cindy called the police, who took her to the Youth Service Center.

The assigned caseworker refused to permit the appellant to take his daughter

home and insisted that he agree to place her in a girl's school for incorrigible and problem children. The alternative threatened was a permanent foster home and never seeing his daughter again. The appellant and his wife were advised that they had no other options, were not entitled to a hearing, and had no legal rights in the matter. Cindy wanted to go home, but was in turn threatened with permanent placement in a foster home by the state.

As the result of such coercion, threats, and intimidation, appellant agreed to the "school". When Cindy entered she found she could not receive mail, was not permitted visitation, could not call home, and could not leave the grounds. She ran away four days after she arrived and remained hidden from her family and the authorities for two weeks. Searches by her parents and the police failed to disclose her whereabouts.

At the end of the two week period, Cindy called her parents and asked to be taken home. The state promptly dropped the case and Cindy remained home with her parents.

At the trial, appellant's efforts to allege and prove that the Department of Social and Health Services (DSHS) had engaged in conduct which deprived him of rights, privileges and immunities secured by the Federal Constitution, was prohibited. This refusal was bottomed on Edgar v. State, 92 W^{2d} 917, which denied a National Guard officer the right to sue the state for damages and deprivation of his civil rights under §1983 of the Federal Civil Rights Act. Edgar relied on this Court's decision in Quern v. Jordan, 440 U.S. 332 (1979).

REASONS FOR GRANTING THE WRIT

A substantial federal question was raised in the state court, which has not

been explicitly foreclosed by prior decisions of this Court so as to leave no room for controversy. Equitable Life Assurance Society v. Brown, 187 U.S. 308. Prior authority of this Court, permitting a state to immunize itself from civil suits for damages by private citizens, harmed by state action, under section 1983 of the Federal Civil Rights Act, should now be overruled under Owen, which broadened its scope to include cities.

Appellant followed state procedures in raising the federal question. The trial court certified it to the State Supreme Court, which avoided the question by a procedural device, i.e., characterizing a section 1983 cause of action as legal theory rather than a claim. (Appendix 2); Rule 54(b) of Rules for Superior Court of the State of Washington. When this occurs, this court can nevertheless assert its jurisdiction. Rodgers v. Alabama, 192 U.S. 226

(attempt by state court to avoid federal question by application of local court rule). The denial of prompt review of this question also visits great hardship, delay, and expense upon appellant.

Likewise, the question presented is a controlling question of law on which there is a substantial difference of opinion. This appeal will materially advance the ultimate termination of the litigation. When the Washington State Supreme Court refused to review the federal question presented, that issue was "final" for purposes of review by this court, notwithstanding there are further proceedings of an entire trial. The federal issue is "conclusive". Cox Broadcasting Corp. v. Cohn, (Ga. 1975) 420 U.S. 469.

Edgar was decided by the Washington State Supreme Court prior to this Court's decision in Owen v. City of Independence, Missouri, 445 U.S. 622 (1980). In light

of the "equitable loss spreading" principle enunciated by this Court in Owen, the entire question of state immunity under the Eleventh Amendment should be reconsidered. State immunity has been addressed by this Court in a checkered and confusing manner over the years.

The Civil Rights Acts grew out of federal civil rights legislation in the form of the Civil Rights Act of 1866 following the Civil War. The Fourteenth Amendment was also ratified by the states during this same period and articulated the principles of the Act of 1866. Section 1983 of the Act was enacted pursuant to Section 5 of the Fourteenth Amendment to fully enforce the constitutional form of the Act, or Section 1 of the Amendment. Section 1 is clearly directed at the states themselves. Therefore, Section 1983 was designed to enforce the Fourteen Amendment and to remedy the unconstitutional indis-

cretions of the states.

The Civil Rights Act of 1866 was reenacted along with other civil rights legislation in 1870 and in April of 1871 Sections 1983 and 1985(3) were passed, now codified as 42 U.S.C. §1983, 1985(3). The main civil rights statutes of the Reconstruction legislation are now codified in 42 U.S.C. §1981 (Equal Rights Under the Law), §1982 (Property Rights of Citizens), §1983 (Civil Action for Deprivation of Rights), §1985(3) (Depriving Persons of Rights and Privileges), 18 U.S.C. §241 (Conspiracy Against the Rights of Citizens), and §242 (Deprivation of Rights Under Color of Law).

The Civil Rights Act of 1871, section 1873, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any

> citizen of the United States ....to the deprivation of any rights....secured by the Constitution....shall be liable to the party injured in an action at law....."

In order to assess this court's reliance in Edgar on Quern, some analysis of the scope and history of the interpretation of Section 1983 must be made.

The Slaughter House Cases, 83 U.S. (16 Wall) 36, ignored congressional intent in enacting the Civil Rights Acts and interpreted the Fourteenth Amendment restrictively as protecting only rights important to national citizenship such as the right to transact business with the federal government and use of federal seaports.

In Monroe v. Pape, 365 U.S. 165 (1961) the court refused to permit citizens to sue cities under Section 1983 for damages arising out of alleged violations of the constitutional rights. Cities, at that time, were not "persons" within the meaning of the

Act.

Edelman v. Jordan, 415 U.S. 651 (1974) followed a decade later. It expanded the doctrine of Monroe by setting up yet a second barrier to State liability under Section 1983 - the Eleventh Amendment to the United States Constitution. The court found that citizens were not entitled to declaratory and injuctive relief against the State of Illinois for violation of their Fourteenth Amendment rights in the administration of programs for the blind, aged and disabled. It judicially enlarged the language and coverage of the Eleventh Amendment by granding the State immunity from suits brought in federal court by its own citizens as well as citizens of other States. The Eleventh Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state,

or by citizens or subjects of any foreign state."

The court was concerned over the payment of monies from a State treasury:

> "Thus the rule was evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the State treasury is barred by the Eleventh Amendment.... The funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois, and thus the award resembles far more closely the monetary award against the State itself (citing cases)....than it does the prospective relief awarded in Ex parte Young."

In Monell, the court noted that Section 1983 was to be given a liberal interpretation in light of its significant legislative history. It could see no reason to suppose that municipal corporations would be excluded from its sweep. It partially reversed Monroe and analyzed thoroughly the intent of the Congress in enacting civil rights legislation. Congress, it said, never intended that cities and local

governments be immune, since Section 1983 had been specifically enacted to enforce the Fourteenth Amendment (Id. 436 U.S. at 700). The court raised serious doubts about the reasoning and validity of Edelman to the extent that the latter held that States were not "persons". It relied on the legislative history of the Act. Quoting from Representative Shellabarger:

> "Why not in advance provide against the denial of rights by the States, whether the denial be acts of omission or commission, as well as against the unlawful acts of combinations and conspiracies against the rights of the people? The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws; because all State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution. As I have said, the States did deny to citizens equal protection of the laws, they did deny the rights of citizens under the Constitution, and except as I have shown, the citizens had no remedy. They took property without

> compensation, and he had no remedy. They restricted freedom of the press and he had no remedy. They restricted freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States or combinations of persons?
>
> "This act is remedial and in aid of the preservation of human rights. All Statutes are liberally and beneficently construed. It would be most strange, and, in civilized law, monstrous, were this not the rule of interpretation."

Thus, the purpose of Section 1983, according to its legislative history, is to redress violations of "human liberty and human rights' committed by the States, State officials, or under color of State law. It was to provide innocent citizens, who were harmed by the abuse of governmental authority, with assurance that they

would be compensated.

Since Monell there have been other decisions undermining Edelman's holding on the scope of a state's liability under Section 1983. In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) the court held that Congress, in adopting the Equal Employment Opportunity Act of 1972 had amended the Civil Rights Act of 1964 to include "governments, governmental agencies and political subdivisions" among employers subject to the Act's protection against discrimination in employment. Hutto v. Finney, 437 U.S. 678 (1978) followed. The court was divided in holding that the Civil Rights Attorney's Fee Award Act of 1976 was intended to override Eleventh Amendment immunity of the states and authorized attorney's fees payable by the states when officials were sued in their official capacities. It found that the Act was broad and lacked any "limit" of exempting States from its scope under the Fourteenth Amendment. It seemed

to comport with Edelman's holding that "Prospective" relief was permissible because it had only "an ancillary effect" on the State treasury. But Hutto diluted and liberalized Fitzpatrick's "clear impression" standard. In fact, Mr. Justice Brennan commented in his concurring opinion that Hutto read in light of Edelman and Monell, made it "surely an open question whether Section 1983 properly construed does not make the States liable for relief of all kinds, notwithstanding the Eleventh Amendment". 437 U.S. at 703. In other words, Fitzpatrick overruled Edelman sub silento.

The Supreme Court sought to clear the controversy in Quern, but only confused the question. The issue was whether a federal district court "may, consistent with the Eleventh Amendment, order.....State officials to send a mere explanatory notice to members of the plaintiff class advising

them that there are state administrative procedures available by which they may receive a determination of whether they are entitled to past welfare benefits". The majority attempted to soften some of the conceptual problems of Edelman, Monell and Fitzpatrick. It reaffirmed Edelman's holding that a State could not be a "person" for purposes of Section 1983, citing Alabama v. Pugh, 430 U.S. 781 (1978) as evidence of such a conclusion. In Pugh, the State of Alabama, named as a party in a suit in which the plaintiff alleged that his criminal confinement was cruel and unusual punishment, asserted it could not be enjoined, relying on Eleventh Amendment immunity. The Supreme Court held that the State could not be named as a party.

The dissent in Pugh, however, disagreed vigorously with Quern's understanding of the scope of Pugh. Justices Brennan

and Marshall stated that the court in Pugh could not have possibly meant to have resolved the issue of whether a State is a "person" within Section 1983.

The Quern court examined the events at the time of the adoption of the Fourteenth Amendment and Monell's reading of the legislative history of Section 1983. It concluded that according to the clear language test of Fitzpatrick or Hutto Congress had not intended to overturn the constitutionally guaranteed immunity of the several States.

While not, perhaps, meeting the strict standards of Fitzpatrick's "clear language" test, Section 1983 would satisfy Hutto's "totality of the circumstances" approach to the clear language test of Congressional intent to abrogate State sovereign immunity.

The first element of the clear language test is whether the legislation was enacted for the purpose of providing a

broad remedy for civil rights violations. 437 U.S. at 694. In Monell the court concluded that "there can be no doubt that Section 1 of the Civil Rights Act was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." 436 U.S. at 700. Neither does Monell's analysis of the legislative history of Section 1983 give any hint of excepting the states from its language. Section 1983's legislative history is quoted extensively in Monell to the effect that cities and other local governments are legal "persons" within the meaning of the section.

Many of the passages quoted in Monell plainly support the view that the 42nd Congress, in passing the Civil Rights Act of 1871, did intend to hold the states accountable for constitutional violations of the rights of their citizens. Representative

Edmonds interpreted Section 1983 as a protective measure for rights guaranteed by the Constitution when they "are assailed by any State or under color of any State law, and it is merely carrying out the principles of the civil rights bill (of 1866), which have since become part of the Constitution..." 436 U.S. at 684-685. Representative Garfield said that Section 1983 was intended to remedy "a systematic maladministration of State law." Senator Thurman, a critic of Section 1983, described the purpose of the legislation as authorizing any person who is deprived of any right, privilege or immunity secured to him by the Constitution, to bring an action against the wrongdoer in federal court...."There is no limitation whatever upon the terms that are employed and they are as comprehensive as can be used." 436 U.S. at 686.

The last element of Hutto's clear

language test is whether the legislation in question "primarily applies to laws passed specifically to restrain State action". 437 U.S. at 694. Section 1983 fulfills this requirement, and that it does is admitted by the Hutto court which cites Section 1983 as an example of legislation aimed at restricting State action. 473 U. S. at 694.

It is thus clear that Section 1983 meets all of the criteria required by Hutto to prove that Congress enacted it with the intent to override State sovereign immunity under the Eleventh Amendment. The Quern court unnecessarily limited the scope of Section 1983, particularly in light of its legislative history and Monell's holding.

The Impact of Owen v. City of Independence, Missouri:

The Supreme Court, against this background, decided to uphold a citizen's right to sue the government for a violation of

his civil rights by preventing a city from seeking sanctuary behind the cloak of even partial sovereign immunity. A lower court had decided that the former Chief of Police of Independence could not collect damages from the City because governments are immune from suit when they discharge their duties in "good faith", even if they unintentionally violate a citizen's rights. The Supreme Court rejected that position and greatly extended the scope of Section 1983 by applying the principal of "equitable loss spreading" among the public, the victim, and offending government official. The court said:

> "Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. No longer is individual 'blameworthiness' the acid test of liability; the principle of equitable loss spreading has joined fault as a factor in distributing the costs of official misconduct.

> "We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the Section 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business, secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the 'execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.'"

The old argument of the Edelmen court that public treasuries would be invaded and that this would cause havoc with the everyday workings of government was dispelled

by Owen. With it fell Eleventh Amentment immunity arguments, also. The same reasoning of the Monell and Owen courts applies equally to State liability. Likewise, both Monell and Owen indicate that Section 1983 was intended to allow redress for constitutional wrongs commited by States and that Congress intended no differentiation between States and municipalities.

CONCLUSION

This Court's holding in Quern is in grave doubt, because it concerned itself with the narrow question of whether a federal district court could order state officials to send explanatory notices to certain members of petitioner's class advising them of state procedures without being barred by the Eleventh Amendment. Quern was neither argued nor briefed.

It is now time for this Court to reassess and overrule the historical claim of

immunity by a state under the Federal Civil Rights Act, in light of Owen, by abolishing all immunity and creating a more workable formula for permitting private citizens to assert claims for damages against transgressing governments of all types.

A Writ of Certiorari should issue to review this important question.

Respectfully submitted,

Robert H. Stevenson

David W. Harris

Attorneys for Appellant

APPENDIX 1

IN THE SUPERIOR COURT OF THE

STATE OF WASHINGTON FOR KING COUNTY

CLYDE C. COFFEY, Plaintiff, vs. STATE OF WASHINGTON, Department of Social and Health Services, Defendant.	NO. 863246 JUDGMENT DENYING MOTION TO AMEND COMPLAINT TO INCLUDE CLAIM UNDER 42 USC §1983

This matter having duly come on for trial on the 9th day of December, 1980, before the undersigned judge of the above-entitled court, plaintiff appearing by his attorney Robert H. Stevenson and Robert Schmitt, and defendant by its attorneys Slade Gorton, Attorney General and Roger A. Gerdes, Assistant Attorney General, and plaintiff having moved to amend its complaint to include a claim under 42 U.S.C. §1983 as set forth in the "third cause of

action" of his "Supplemental Notice of Trial Amendment" dated June 17, 1980, and filed herein, and this court having heard and considered argument of counsel and having considered the records and file herein, including:

1) Plaintiff's Summons and Complaint
2) Defendant's Answer, Affirmative Defenses and Motion to Dismiss,
3) Plaintiff's Supplemental Notice of Trial Amendment (dated June 17, 1980)
4) Plaintiff's Trial Memorandum
5) Defendant's Memorandum Supporting Dismissal
6) Defendant's Trial Brief;

and having read and considered inter alia, decisions in Edgar v. State 92 Wn 2d 217 (1979); Owen v. Independence U.S. L.Ed2d 673 (1980); and the court concluding that the word "person" as used in 42 U.S.C. §1983 does not include states and that the defendant State of Washington is not suable under §1983, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, That 42 U.S.C. §1983 may not be the

basis of a cause of action by plaintiff against the State of Washington, and plaintiff's motion to amend his complaint to include the "third cause of action" set forth in his "Supplemental Notice of Trial Amendment" is therefore denied.

The Court further finds pursuant to CR 54(b), that in this action plaintiff has presented more than one claim for relief, that there is no just reason for delay, and that this partial judgment barring any 42 U.S.C. §1983 claim by plaintiff against the State of Washington, involves a fundamental and urgent issue of broad public import requiring prompt and ultimate determination, and that this judgment should be entered as a final and appealable judgment as to that claim, Now Therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED,

that this is a final and appealable

judgment barring any claim by plaintiff against defendant State of Washington under 42 U.S.C. §1983.

It is Further Ordered, Adjudged and Decreed that, pursuant to the stipulation of both parties orally made in open court, this matter shall remain assigned to the undersigned Judge of this court, and will be returned to his court for any further proceedings and trial, if necessary, after completion of the appeal or other appellate review, if any, of this judgment, and that the parties may engage in further pretrial discovery pending and during such appeal and that the undersigned Judge shall retain jurisdiction for the limited purposes of determining and supervising issues which may arise in the course of such discovery while such appeal is pending.

DONE IN OPEN COURT this 17th day of

December, 1980.

William Goodloe
JUDGE

Presented by:

Robert Stevenson or Robert Schmitt
Attorneys for Plaintiff

Copy Received and Notice of
Presentation Waived:

Slade Gorton
Attorney General

Roger A. Gerdes,
Assistant Attorney General

APPENDIX 2

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

CLYDE C. COFFEY, Appellant, v. STATE OF WASHINGTON and the Department of Social and Health Services, State of Washington, Respondent.	No. 10553-1-I COMMISSIONER'S RULING DISMISSING APPEAL

The above-entitled appeal was transferred to Division I of the Court of Appeals from the Supreme Court on July 22, 1981. By letter dated July 27, 1981, counsel were advised that in view of the decision in Doerflinger v. New York Life Ins. Co., 88 Wn2d 878, 567 P.2d 230 (1977), a court's motion to dismiss the appeal as from a non-appealable order would be heard on August 28, 1981. Appellant Clyde C. Coffey filed a memorandum in opposition to the court's motion on August 18, 1981.

Counsel for appellant having appeared, and the commissioner having reviewed the records and files in this court, and having determined that appellant seeks review of "that certain Judgment Denying Motion to Amend Complaint to Include Claim Under 42 U.S.C. 42 §1983", and it appearing that the claim under Section 1983 is based upon the same allegations and does not give rise to a separate set of facts, and that the appeal is from a separate theory of recovery and not a separate claim as required under CR 54(b) and RAP 2.2(d); now, therefore, it is hereby

ORDERED that the above-entitled appeal is dismissed.

Done this 15th day of September, 1981.

Larry A. Jordan
Court Commissioner

APPENDIX 3

THE SUPREME COURT
STATE OF WASHIGTON
OLYMPIA

June 30, 1982

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Counsel:

Re: Supreme Court No. 48709-0- Coffey v. DSHS
Court of Appeals No. 10553-1-I

Following consideration of the above entitled Petition for Review on June 30, 1982, the following notation order was entered on page 210, Volume 2, of the Petition for Review Docket:

"DENIED"

/s/ Robert F. Brachtenbach
Chief Justice

Very truly yours,

John J. Champagne
Clerk

APPENDIX 4

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

CLYDE C. COFFEY, Appellant, v. STATE OF WASHINGTON AND the DEPARTMENT OF SOCIAL AND HEALTH SERVICES, STATE OF WASHINGTON, Respondent.	MANDATE No. 10553-1-I King County No. 863246

The State of Washington to: The Superior Court of the State of Washington in and for King County.

This is to certify that the Court of Appeals of the State of Washington, Division I, considered and granted a motion to dismiss the appeal in the above entitled case on September 15, 1981. Accordingly, this cause is mandated to the Superior Court from which this appeal was taken for further proceedings in accordance with the determination of that court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 14th day of July, 1982.

Richard D. Taylor
Clerk of the Court of
Appeals, State of Washington, Division I

cc: Mr. Robert H. Stevenson
Office of the Attorney General
Mr. Roger A. Gerde, Asst.

Office - Supreme Court, U.S.
FILED
OCT 25 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

NO. 82-496

October Term, 1982

CLYDE C. COFFEY,

Petitioner,

vs.

STATE OF WASHINGTON, Department of Social and Health Services, State of Washington,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

CLYDE C. COFFEY,

Petitioner,

vs.

STATE OF WASHINGTON, Department of Social and Health Services, State of Washington,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

The respondent State of Washington respectfully urges that the petition for issuance of a writ of certiorari in this cause be denied.

OPINION(S) BELOW

No final judgment or decision has been entered by the court below. The Supreme Court of the State of Washington simply has denied a petition for discretionary review [1] of an order by the intermediate state Court of Appeals. That order [2] dismissed petitioner's appeal on the grounds that the attempted interlocutory appeal was premature: although the order appealed from purported to be a CR 54(b)[3] partial summary judgment as to some but not all of plaintiff's claims, it was in fact not a final judgment or other appealable order

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1 See Appendix 3 to the Petition on file.

2 Appendix 2 to the Petition is a copy of the state Court of Appeal's "Commissioner's Ruling Dismissing Appeal."

3 Washington's Superior Court Rule 54(b), with but a minor and here irrelevant addition, is identical to Federal Rule of Civil Procedure 54(b).

under Washington's court rules. The Washington Supreme Court made clear in Doerflinger v. New York Life, 88 Wn. 2d 878, 567 P. 2d 230 (1977), that its refusal to entertain an appeal under the circumstances of that case --and this one-- is not a ruling on the merits of the appeal, but that the merits can more properly be reviewed on appeal after all issues had been resolved at the trial level. The court observed:

> We dismiss the appeal and remand it to the trial court. In so doing, we express no opinion on the merits of the issues raised by the appellants here and do not intend by this dismissal to foreclose further consideration of these issues at the trial court level. Doerflinger, supra at 883.

No trial has yet been held on any issues in this case. A trial date was set for December 9, 1980, when the appellant attempted to amend his tort complaint

against the State of Washington by adding a claim under 42 U.S.C. Sec. 1983 based on the same alleged factual circumstances. The amendment was opposed by respondent State on grounds that it was barred by the Eleventh Amendment to the United States Constitution, that a state is not a "person" against which suit was allowed by Sec. 1983, and that plaintiff's amended complaint failed to state a claim upon which relief could be granted under Sec. 1983. The trial court denied appellant's proposed trial amendment and continued the trial at appellant's request to enable him to seek review of the ruling. Although the trial court entered an order [4] purporting to be a final and appealable judgment under CR 54(b), the State Court of Appeals held it not to be a final or appealable order under Doerflinger, supra:

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4 See Appendix 1 to the Petition on file.

> . . . it appearing tht the claim under Section 1983 is based upon the same allegations and does not give rise to a separate set of facts, and that the appeal is from a separate theory of recovery and not a separate claim as required under CR 54(b) and R.A.P. 2.2(d) . . .

A mandate to the Superior Court to proceed to trial has been issued. [5]

JURISDICTION

This Court lacks jurisdiction of the instant petition for certiorari. Petitioner has failed to identify in the jurisdictional statement as required in Court Rule 21.1(e)(i), specifically what judgment or decree he seeks to review. Petitioner's jurisdictional statement [6] of the statutory provisions identifies only 28

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5 Appendix 4 to the Petition.
6 See Petition for Certiorari, pg. 3.

U.S.C. Sec. 1331(a) (which pertains to U.S. District Court jurisdiction) and 28 U.S.C. Sec. 1257(3). The latter statute authorizes review by writ of certiorari in this Court only when a final judgment or decree has been entered below. None of the "opinions below" constitute a final judgment as a matter of state law.

COUNTERSTATEMENT OF THE CASE

No trial has been held because appellant sought and obtained a continuance on the morning of trial to seek review of the denial of the time-of-trial motion to amend the complaint to add a Sec. 1983 civil rights violation claim to the previously alleged tort action against the respondent State.

Petitioner's "Statement of the Case" is merely his perception of what he hopes

the evidence will show. Virtually all the claims therein set forth will be disputed at trial.

Even if it were assumed arguendo that appellant's statement of the case was factually correct, the amendment to the Complaint[7] which was denied by the trial court's order, did not purport to allege (as petitioner's "Statement of the Case" now alleges) that violations of his "Fourteenth Amendment rights" were the basis for his claim under the Civil Rights Act of 1971, (42 U.S.C. Sec. 1983). The proposed amendment incorporated by reference the allegations of "conduct and acts" set forth in plaintiff's "Complaint for Damages," [8] which pled no violation of

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7 See the "third cause of action" set forth in the "Supplemental Notice of Trial Amendment," a copy of which is attached as Appendix 1 hereto.

8 Appendix 2 hereto is a copy of plaintiff's "Complaint For Damages."

any federal statute or constitutional requirement. The complaint alleges only violations by state employees of state statutes.

Plaintiff's proposed amendment to the Complaint merely recites a new theory of recovery (under Sec. 1983) based on the same facts and circumstances that already had been alleged in his tort claim. The appellate court's refusal to treat the trial court order denying appellant's proposed amendment as an appealable final order was based on the Washington state court's rules of what constitutes an appealable order (CR 54(b)). The state court's interpretation of the state rule followed the federal practice (88 Wn.2d at 882):

> . . . While clearly the court did abandon the mechanical requirement that only claims which are factually separate and independent are multiple claims,

nevertheless, cases since then have not gone so far as to treat every variation in legal theory as a separate claim. See, e.g. CMAX, Inc. v. Drewery Photocolor Corp., 295 F.2d 695 (9th Cir. 1961); Baca Land & Cattle Co. v. New Mexico Timber, Inc., 384 F.2d 701 (10th Cir. 1967).

We concur with the approach of the federal courts. Therefore, while we reject the test in Gazin, we hold the separate legal theories presented by appellants are not multiple claims and thus are not subject to the entry of final judgment upon dismissal by the trial court.

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied. There has been no final judgment or decree in the state courts and therefore no jurisdiction arises under 28 U.S.C. Sec. 1257 for issuance of the writ. Furthermore, the trial court decision, which is not a final state court decision, that a "state" is not a "person" within the

intent of Sec. 1983 is consistent with, not in conflict with, federal law as decided by this Court.

Petitioner has failed to show any special or important reason as set forth in Supreme Court Rule 17, or otherwise, for issuance of the writ.

ARGUMENT

1. Jurisdiction Is Lacking In This Court To Issue A Writ Of Certiorari Where There Has Been No Final Judgment Or Decree In The State Court Below.

28 U.S.C. Sec. 1257, under which petitioner seeks to invoke this Court's jurisdiction, allows review only of a final judgment or decree. No such final judgment or decree has been entered below. The decision of the state Court of Appeals,

which the state Supreme Court has refused to review, was merely that the trial court's order denying appellant's trial amendment was not yet an appealable final judgment subject to review. That decision leaves open the opportunity for appellant to reopen the issue on the merits at the trial level, and, if he continues to be unsuccessful there, on appeal of a final judgment after trial. That is made clear by the appellate court's express reliance on Doerflinger, supra. See the quoted material at pg. 3, 4, supra.

An attempt to obtain review of a state lower court decision by certiorari should be dismissed where the state court decision makes it clear that petitioner can raise constitutional issues in the trial court and obtain appellate review to the state appellate courts. Costarelli v. Massachusetts, 421 U.S. 193, 95

S.Ct. 1534, 44 L.Ed.2d 76 (1975), Batemas v. Arizona, 429 U.S. 1302, 97 S.Ct. 1, 50 L.Ed.2d 32 (1976). A writ of certiorari attempting to review denial of an interlocutory appeal should be dismissed in view of the lack of finality of the order. Whitus v. State of Georgia, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 559 (1967).

The burden is on petitioner to establish the Court's jurisdiction. Republic Natural Gas Co. v. State of Oklahoma, 334 U.S. 62, 70-71, 68 S.Ct. 972, 92 L.Ed. 1212 (1948):

> Merely because a party to a litigation may be temporarily out of pocket, is not sufficient to warrant immediate review of an incomplete State judgment.

(2) Appellant Has Failed To Establish Any Reason For Granting A Writ As Required By Supreme Court Rule 17.

The trial court's decision that a Sec. 1983 claim does not lie against a state is consistent with rulings of this Court. Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979); Alabama v. Pugh, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978); the federal Court of Appeals, McConnell v. Critchlow, 661 F.2d 116 (9th Cir. 1981); and the Washington state Supreme Court, Edgar v. State, 92 Wn.2d 217, 595 P.2d 534, cert. denied 444 U.S. 1077 (1979).

None of the considerations for granting a writ of certiorari set forth in Supreme Court Rule 17 are present in this case. Petitioner's suggestion that Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) somehow undermines this Court's earlier rulings that a state is not a "person" within the meaning of Sec. 1983 is a rank

misconstruction of Owen. That decision merely addressed the question expressly left open by Monell v. New York City Department of Soc. Serv., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1973) of whether municipal corporations held suable in Sec. 1983 actions by Monell retained any immunity defenses in such suits.

What "special and important reason" warrants issuance of a writ in this case in which petitioner has pointed out no inadequacy or unavailability of due process if he is limited to a tort theory of recovery against the State as he originally alleged? No showing has been made here or below, that any substantial difference in state court procedure is involved. Nor has petitioner pointed out any substantive difference in remedy available under his new theory.

Petitioner's proposed amendment to his state-court, tort complaint below adds no additional or different factual allegations to support a Sec. 1983 claim. To the contrary, his interrogatory answers appear to limit his complaint to alleged violations of state, not federal, statutes by state employees. Petitioner's tort complaint against the State in the trial court below seeks the same relief for the very same facts and circumstances, the same "conduct and acts" of the same state employees, as does his proposed amendment. Nowhere in his petition does he suggest how his state court remedies in tort are any less effective than those under Sec. 1983.

Even if that section authorized claims against states, which it does not, appellant's pleadings below, including the rejected amendment, fail to adequately allege an action under 42 U.S.C. Sec. 1983

for violation of the due process clause of the Fourteenth Amendment. The claimed violations did not occur as the result of some established state procedure, but rather as the result of the alleged failure of the state's agents to follow established state procedures and statutes, [9] and, the state itself provides an adequate remedy to persons who believe they have suffered a tortious loss at the state's hands. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1980, 68 L.Ed.2d 420 (1981). The Parratt approach of considering "the adequacy and availability (not exhaustion) of remedies under state law before concluding that a deprivation of life, liberty or property violates due process of law" also has been used in determining the adequacy of attempts to plead Sec. 1983 claims involving interference with family

9 See, for example, paragraphs 5(a) and (e) of the Complaint, Appendix 2 hereto.

relationships. Ellis v. Hamilton, 669 F.2d 510 (7th Cir. 1982); Wise v. Bravo, 666 F.2d 1328 (10th Cir. 1981). In deprivation of liberty cases under Sec. 1983, where there is no practical way to provide a predeprivation hearing, and the postdeprivation hearing provided by state law satisfies the due process requirements of the Fourteenth Amendment, it has been held that the alleged deprivation was not without due process of law. Particularly is this the case where petitioner actually has sought redress under the state law in the state court. Rutledge v. Arizona Board of Regents, 660 F.2d 1345 (9th Cir. 1981).

Moreover, respondeat superior is not a permissible theory for holding a local governmental body liable for constitutional violations of its employees Monell v. New York City Dept. of Soc. Serv., supra; Wise v. Bravo, supra. Plaintiff's

Complaint, paragraphs 3 and 5 make it clear that plaintiff's allegations relate to claimed wrongs of defendant state's employees in violation of state law and policy. Appendix 2.

Even if the State of Washington (as distinguished from its officers, agents and employees acting under color of its authority) were subject to suit under 42 U.S.C. Sec. 1983 petitioner has failed to adequately state a claim thereunder.

CONCLUSION

The absence of a final decision or judgment in the court below precludes this Court from exercising jurisdiction under 28 U.S.C. Sec. 1257. The policy of that statute against piecemeal review and interference with an orderly judicial process is particularly applicable to this

case where petitioner has adequate remedies, which he is actively pursuing in the very state court forum.

Even if a Sec. 1983 claim were allowable against a "state," petitioner has failed to state a claim under the statute and failed to show how the available state-court, tort remedy is lacking in due process or inadequate.

Similarly petitioner has failed to demonstrate any special or important reason warranting interlocutory review by certiorari of a pre-trial order of the trial court. Under clearly expressed state court rules and decisions the merits of the trial court pretrial order are subject to review on appeal by the state appellate courts. They have not been reviewed on the merits as yet solely because petitioner attempted an interlocutory appeal of a

pre-trial order without awaiting entry of a final, appealable judgment.

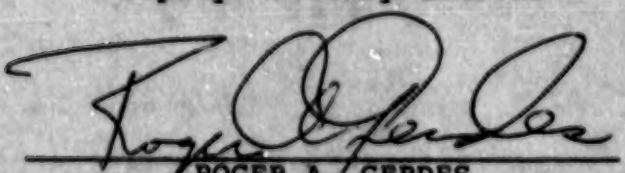
Respondent requests that the petition for writ be denied.

DATED this 15th day of October, 1982.

Respectfully submitted,

KENNETH O. EIKENBERRY
Washington State Attorney General

EDWARD B. MACKIE
Deputy Attorney General



ROGER A. GERDES
Assistant Attorney General
Counsel for Respondent

APPENDIX 1

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR KING COUNTY

CLYDE C. COFFEY,	)	
	)	
Plaintiff, ,	)	NO. 863 246
	)	
v.	)	SUPPLEMENTAL
	)	NOTICE OF
STATE OF	)	TRIAL
WASHINGTON,	)	AMENDMENT
et al.,	)	
Defendants.	)	
	)	

TO: The above named defendants and their attorneys of record

YOU AND EACH OF YOU WILL TAKE NOTICE that plaintif will orally move to amend his Complaint herein to add the following paragraphs thereto:

And for a second and separate cause of action against defendants, plaintiff alleges:

1.

That plaintiff realleges paragraphs 1 through 5 above.

2.

That the conduct of defendant toward plaintiff was outrageous, extreme, deliberate and wilful, going beyond the bounds of decency, proximately causing plaintiff severe emotional and mental distress and anxiety, all to his damage in the sum of $235,000.00.

And for a third cause of action against the defendants, plaintiff alleges:

1.

That the conduct and acts of the defendant violated the plaintiff's civil rights under the Civil Rights Act of 1871, which proximately caused the severe

emotional and mental distress and anxiety to plaintiff herein above alleged, all to plaintiff's damage in the sum of $235,000.00.

Dated this 17th day of June, 1980.

ROBERT H. STEVENSON

Attorney for Plaintiff

APPENDIX 2

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR KING COUNTY

CLYDE C. COFFEEY, Plaintiff,	NO. 863246
v.	COMPLAINT FOR DAMAGES
STATE OF WASHINGTON, AND DEPARTMENT OF SOCIAL AND HEALTH SERVICES, STATE OF WASHINGTON, WASHINGTON, Defendants.	

COMES NOW the Plaintiff and alleges:

1.

That Plaintiff is now and at all times material herein was a resident of Seattle, King County, Washington and had legal custody and control of his minor daughter, Cynthia Coffey, age 14.

2.

That on or about March 2, 1979, Plaintiff presented and filed his verified claim for damages herein described against the Defendants with the Office of Financial Management of the State of Washington pursuant to R.C.W. 4.92.100, Laws of the State of Washington.

3.

That on or about February of 1979 in Seattle, Washington, the Department of Social and Health Services, a department of the State of Washington, by and through its agents, servants and employees, negligently, wilfully and without a hearing, deprived Plaintiff of the physical custody of his 14-year old daughter, Cynthia Coffey; that at or about said time and place said Defendant wrongfully advised Plaintiff that he had no right to a hearing

concerning the matter and "no rights at all" as a parent; that Plaintiff was also advised that if Plaintiff refused to sign "papers" to place Cynthia in a school or foster home at once, she would be permanently taken from Plaintiff; that Plaintiff must place Cynthia in the Ruth School in Seattle and that Plaintiff would be required to entertain Cynthia on Saturdays and Sundays by spending at least $25 per day on her; that the rules of Plaintiff's home with respect to the discipline of Cynthia were no longer viable or applicable.

4.

That as a result of the foregoing threats and coercion by Defendant, Plaintiff placed the custody of Cynthia Coffey in the Ruth School on or about February 28, 1979. That thereafter, Cynthia Coffey ran away from said school

because of the lack of proper supervision and control. That Plaintiff's daughter was missing for several weeks from said school and her whereabouts unknown to Plaintiff and the school; that thereafter Plaintiff's daughter contacted Plaintiff voluntarily and returned to Plaintiff's home of her own free will and accord, refusing to go back to said school again.

5.

That Defendants were negligent and guilty of misfeasance and wilful misconduct in the following manner:

(a) in failing to afford the Plaintiff a judicial hearing with respect to the claimed abuses and his daughter and her physical custody or control pursuant to R.C.W. 26.44.053.

(b) in threatening to deprive

permanently Plaintiff of his daughter's custody if Plaintiff did not "sign papers" immediately for her entrance into a school picked by the Department of Social and Health Services.

(c) in advising Plaintiff that his own home rules with respect to his daughter's discipline no longer was viable or applicable.

(d) in coercing Plaintiff to place his daughter in the Ruth School where she immediately ran away, resulting in her whereabouts being unknown for weeks by Plaintiff or the school.

(e) in failing to follow the statutes of the State of Washington with respect to claimed physical abuse by a minor, i.e. investigating tthe allegations, making reports available to Plaintiff, taking

physical custody of Plaintiff's daughter and failing to afford Plaintiff a hearing regarding all of same.

6.

That as a direct and proximate result of the negligence, misfeasance and wilful misconduct of the Defendants as aforesaid, Plaintiff suffered and continues to suffer pain, personal humiliation, discomfort, and acute distress, all to his damage in the sum of $235,000.

WHEREFORE Plaintiff prays for judgment against Defendant in the sum of $235,000 and his costs herein.

ROBERT H. STEVENSON

STATE OF WASHINGTON)
County of King)

CLYDE C. COFFEY, being first duly sworn deposes and says that he is the Plaintiff in the above-entitled action, has read the foregoing, and believes it to be true to his knowledge and belief.

CLYDE C. COFFEY

SUBSCRIBED AND SWORN TO before me this 4th day of May, 1979.

_____

NOTARY PUBLIC in and for the State of Washington residing in Renton.